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No. 84-1491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PHILADELPHIA NEWSPAPERS, INC., *et al.*,

Appellants,

—v.—

MAURICE S. HEPPS, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, ASSOCIATION OF AMERICAN PUBLISHERS, DOW JONES & COMPANY, INC., GANNETT CO., INC., THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, and TIME, INC., AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

The American Civil Liberties Union, The American Civil Liberties Union of Pennsylvania, American Newspaper Publishers Association, Association of American Publishers, Dow Jones & Company, Inc., Gannett Co., Inc., The Society of Professional Journalists, Sigma Delta Chi, and Time, Inc. move pursuant to Rule 36.3 of the Rules of the Supreme Court of the United States for leave to file a brief amicus curiae in support of Appellants. The written consent of the Appellants is on file with the Court. Appellees have not consented to the filing of this brief, although they do not oppose this motion. Their letter explaining their position is on file with the Court.

Each of the organizations which has joined as amici on this brief has a special interest in the resolution of the issues on appeal in this case. The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit membership organization of over 250,000 members dedicated to the

promotion and defense of the fundamental personal liberties guaranteed by the Constitution of the United States. The ACLU of Pennsylvania is the state chapter of the national organization which represents those interests in the State of Pennsylvania. Foremost among liberties defended by the ACLU are freedom of speech and freedom of the press protected by the First and Fourteenth Amendments. Moreover, the ACLU and its affiliates have traditionally defended citizens from arbitrary actions by state legislatures.

The American Newspaper Publishers Association is a national trade association of nearly 1,400 newspapers, representing about 99% of the daily newspaper circulation in the United States.

The Association of American Publishers, Inc. ("AAP"), a not-for-profit trade association organized under the laws of the State of New York, is the major national association of book publishers in the United States. AAP's approximately 325 members include most of the leading commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish in the aggregate a majority of all general and educational books published in the United States.

Dow Jones & Company, Inc. publishes, *inter alia, The Wall Street Journal, Barron's National Business* and *Financial Weekly*, a variety of national and international electronic news services, textbooks through its Richard D. Irwin, Inc. subsidiary, and 22 community daily newspapers through its Ottaway Newspapers, Inc. subsidiary.

Gannett Co., Inc. ("Gannett") publishes eighty-six daily newspapers throughout the United States, including the national newspaper *USA Today*. Gannett also publishes thirty-eight non-daily newspapers and *USA Weekend*, and in addition operates six television stations and fourteen radio stations.

The Society of Professional Journalists, Sigma Delta Chi is a voluntary, not-for-profit organization of nearly 28,000 members representing every branch and rank of print and broadcast journalism. The Society's purposes, expressed by its founders in 1909, include "work to safeguard the flow of information from all sources to the public so that it has access to the truths required to make democracy function and to protect our freedoms."

Time Incorporated is the largest publisher of general circulation magazines in the United States. It publishes TIME, FORTUNE, SPORTS ILLUSTRATED, PEOPLE, MONEY, LIFE and DISCOVER.

The amici represent a broad spectrum of those citizens and organizations whose interests in free speech and free press are threatened by the decision of the Pennsylvania Supreme Court on review here. Because the amici and their members have historically contributed to the maintenance of freedom of the press and individual liberties, and because members of amici are often parties to similar lawsuits, the resolution of the Constitutional question to be decided by this Court will directly and pervasively affect them. The amici are particularly concerned with the national implications of the rulings at issue here and will present to the Court a broader perspective on the effect of state libel law on the freedoms of speech and press guaranteed by the First Amendment.

Respectfully submitted,

/s/ JOHN G. KOELTL
John G. Koeltl

Dated: August 19, 1985
New York, New York

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INTERESTS OF AMICI CURIAE

A motion for leave to file this brief is being presented today pursuant to Rule 36.3 of the Rules of this Court. The interests of amici curiae are set forth in the motion, which is bound with this brief as set forth in Rule 33.2(b). Placing the burden of proof on a defendant and presuming that a defamatory statement is false, which the Pennsylvania Supreme Court did in this case, deters truthful reporting and restricts public debate

by allowing the imposition of liability upon the press for printing the truth, and by discouraging truthful reporting when the truth of a report will be difficult to prove in court. Moreover, the statutory presumption of the falsity of published statements based on their defamatory character violates due process of law because there is no rational connection between the defamatory nature of a statement and its falsity. The legislative scheme represents a serious threat to the ability of the press to provide information to the public, and interferes with the public debate protected by the First Amendment, which are central concerns of the amici.

STATEMENT OF THE CASE

Between May 5, 1975 and May 2, 1976 *The Philadelphia Inquirer* printed five news articles which purportedly linked a prominent businessman and several beer and beverage distributorships to certain named "underworld" figures and to organized crime generally. (Joint Appendix, hereinafter "J.A.," A60-A74.) Maurice S. Hepps, the individual plaintiff, was the principal stockholder of a corporate plaintiff, General Programming Inc., which owns the trademarks "Thrifty Beverage" and "Brewer's Outlet," licenses these trademarks, and provides management and consulting services to licensees. Corporate and individual licensees were also plaintiffs. As a result of these articles the plaintiffs instituted a civil action for libel against Philadelphia Newspapers Inc., which publishes *The Philadelphia Inquirer*, and two reporters who prepared the articles. (J.A. A155)

In July, 1981, after a six-week trial in the Pennsylvania Court of Common Pleas, the jury returned a general verdict in favor of the newspaper and the reporters. (J.A. A107) Prior to instructing the jury, the trial court declared unconstitutional 42 Pa. Cons. Stat. Ann. § 8343(b)(1) (Purdon 1982), which places the burden of proving the truth of a defamatory statement on defendants in libel actions. In a subsequent opinion explaining its ruling, the trial court held that in a libel action

brought by a "private figure" against a media defendant, the First Amendment, as interpreted in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), requires that the plaintiff bear the burden of proving the falsity of the defamatory publication. (J.A. A108) The court noted that in *Gertz*, this Court held that the states may not impose "liability without fault" in libel cases brought by private persons. 418 U.S. at 347. The trial court reasoned that because the allocation to defendants of the burden of proof for truth will sometimes result in liability without fault, *Gertz* requires a private figure plaintiff to prove "falsity." After surveying the significant support for its interpretation, at both the state and the federal level, the trial court concluded that the Pennsylvania statute in question, if held to be constitutional, would "distort the balance the Court struck in *Gertz*." (J.A. A131)

The Supreme Court of Pennsylvania reversed, holding it constitutional to place on media defendants the burden of proving the truth of an allegedly libelous statement. *Hepps v. Philadelphia Newspapers*, 485 A.2d 374 (Pa. 1984) (J.A. A155). The Supreme Court reasoned that *Gertz* required only that the states not impose liability for libel without fault and that Pennsylvania still required a libel plaintiff to prove negligence although not falsity as part of the plaintiff's case. The Supreme Court also explained that while falsity is an element of the tort of libel, that element is presumed in Pennsylvania from the injurious nature of the words. 485 A.2d at 379 and n.2. The court found no constitutional infirmity in the statute, relying on the common law presumption of falsity, evidentiary convenience, and general state policy to uphold the Pennsylvania libel law. (J.A. A161-A175)

SUMMARY OF THE ARGUMENT

Pennsylvania's statute imposing the burden of proving the truth of defamatory statements on media defendants violates the First Amendment. Allocating the burden of proof to defendants will permit civil liability for libel when the fact finder has made no finding that a defamatory statement is false. The First Amendment does not permit the Pennsylvania legislature's choice to err on the side of penalizing fully protected truthful speech. Moreover, the assumption of the burden of proof forces media defendants to calculate not whether what they print is true, but rather whether they will be able to prove in court that what they print is true. Such a calculation impermissibly impedes the wide-open and robust debate guaranteed by the First Amendment.

Pennsylvania's burden of proof, which presumes the falsity of a statement solely from its defamatory character, violates the due process clause of the Fourteenth Amendment because there is no rational connection between the fact that a statement is defamatory and the presumption that it is false. This irrational presumption precludes the reasoned decision-making that the Constitution requires of courts.

ARGUMENT

I. THE PENNSYLVANIA STATUTE IMPOSING THE BURDEN OF PROVING THE TRUTH OF A DEFAMATORY STATEMENT ON THE DEFENDANT IN A LIBEL ACTION VIOLATES THE FIRST AMENDMENT.

A. Imposing the Burden of Proving Truth on Defendants Unconstitutionally Sanctions Truthful Speech.

Allocating to the defendant the burden of proving truth in a libel case is a conscious government choice to permit truthful speech to be punished by civil damage awards. There will always be cases where the evidence is unclear concerning whether published statements are true or false. Allocating the burden of proof on the issue of truth or falsity is the means by which the government chooses whether, if an error is made on that issue, the error will penalize a truthful statement or allow a false statement to go uncompensated. By requiring the defendant to prove truth as a defense, the government increases the number of cases where truthful speech will be penalized as libelous. The First Amendment prohibits the government from consciously allowing truthful speech to be penalized. The government must err on the side of protecting what may be false speech to avoid penalizing protected, truthful speech.

This Court has held for over twenty years that state libel laws must comply with First Amendment requirements. *See New York Times v. Sullivan*, 376 U.S. 254 (1964) (public officials); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (public figures). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court held that states could not impose "liability without fault" for defamatory falsehoods injurious to private individuals. *Id.* at 347. The Court thereby removed libelous words from the class of speech "wholly unprotected by the First Amendment. . . ." *Id.* at 370 (White, J., dissenting). This past Term, in *Dun & Bradstreet, Inc. v. Greenmoss*

Builders, 53 U.S.L.W. 4866 (U.S. June 26, 1985), this Court explained that the rules set out in *Gertz* should be limited to statements about matters of "public concern."

This case, like *Gertz*, is a libel action by a "private figure" regarding defamatory statements of "public concern." The purportedly libelous statements concerned alleged links of a prominent businessman and organizations to organized crime. They were published over the course of a year by a major newspaper with a circulation far wider than the five subscribers who received the credit report in *Dun & Bradstreet*. The articles deal with matters of public concern that comprise part of the "uninhibited, robust, and wide-open" debate on public issues that lies at the heart of First Amendment protection. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

In its libel decisions from *New York Times* through *Dun & Bradstreet*, this Court has attempted to reach "the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz*, 418 U.S. at 325. Those decisions have sought to meet two goals: to protect truthful speech by providing the "breathing space" required by the First Amendment and to allow injured plaintiffs to be compensated for harm to their reputation. *See New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964). In striking the proper balance between these competing aims, the Court has always recognized that "the crucial question is the degree to which the law of defamation actually constrains the communication of truthful information." L. Tribe, *American Constitutional Law*, § 12-13, at 641 (1978). As the Court recently described its ultimate goal:

> Realistically . . . some error is inevitable; and the difficulties of separating fact from fiction convinced the Court in *New York Times*, *Butts*, *Gertz* and similar cases to limit liability to instances where some degree of culpability is present *in order to eliminate the risk of undue self-censorship and the suppression of truthful material.*

Herbert v. Lando, 441 U.S. 153, 171-72 (1979) (emphasis added).

Requiring the defendant to prove the truth of a defamatory statement as a defense will inevitably penalize some truthful speech in books, newspapers and other media.[1] The burden of proof operates so that in close cases, when a jury is unable to decide a fact in issue, the jury will decide against the party bearing the burden of proof. *See Lohman v. General American Life Insurance Co.*, 478 F.2d 719, 726 (8th Cir.), *cert. denied*, 414 U.S. 857 (1973); E. Cleary, *McCormick on Evidence*, § 336, at 947 (3d ed. 1984). The burden of proof thus serves as a mechanism for "handicapping a disfavored contention," E. Cleary, *McCormick on Evidence*, § 337, at 950 (3d ed. 1984), and allocating the risks of error and loss:

> selection of a burden of proof rule requires a choice as to which party should be assigned the risk of loss in the event that the uncertainties in the evidence make it difficult to say that the fact in dispute is more likely so than not so.

Caiazzo v. Volkswagenwerk A.G., 647 F.2d 241, 255 (2d Cir. 1981) (Newman, J., concurring in part and dissenting in part).

In libel cases, the allocation of the burden of proving truth or falsity reflects an inescapable choice of preferred error: because judges and juries will inevitably make some errors in

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1 Forcing a libel defendant to carry the burden of proof also punishes and deters truthful individual expression. As libel suits against individuals increase, if individual defendants must bear the risk of a fact finder's error and must determine before speaking out whether they will be able to prove their statement in court, individual expression will be severely compromised. Some individual truthful speech will be silenced or punished. *See* Ketcham, *Libel Suit: Tool Against Activism?*, N.Y. Times, Apr. 7, 1985, § 11LI, at 10, col. 3; Greenhouse, *Outspoken Private Critics of Officials Increasingly Face Slander Lawsuits*, N.Y. Times, Feb. 14, 1985, at B11, col. 1. Since individuals have fewer resources than most media they face the greatest threat of intimidation by libel suits. When speakers bear the burden of proof, public officials and other potential libel plaintiffs are encouraged to use libel complaints in order to silence their critics. The First Amendment prohibits such a deterrent effect on individual speech.

deciding what is truth, the issue is whether the fact finder should err more often in penalizing truthful speech or in failing to penalize false speech. The First Amendment requires that the government not err on the side of penalizing truthful speech. While the states are surely entitled to use libel laws to protect reputational interests, the states cannot structure libel laws to punish consciously the publication of truthful facts. *Cf. Paul v. Davis*, 424 U.S. 693 (1976). The First Amendment cannot tolerate a procedural device that "handicaps" the contention that the speech at issue is truthful and thus permits speech to be sanctioned without any finding that it is false.

> In the normal civil suit where [the preponderance of the evidence] standard is employed, 'we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.' *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring). *In libel cases, however, we view an erroneous verdict for the plaintiff as most serious*. Not only does it mulct the defendant for an innocent misstatement . . . but the possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate.

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50 (1971) (Opinion of Brennan, J.) (emphasis added).

This Court has recognized the importance of the burden of proof in protecting First Amendment interests by requiring that the plaintiff prove the falsity of any defamatory statement with clear and convincing evidence in libel suits against public officials and public figures. *See New York Times v. Sullivan*, 376 U.S. 254, 285-86 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (interpreting *New York Times* to require proof of falsity). These decisions recognize the powerful function that proof rules serve in allocating the risks of jury speculation and error in libel trials. Indeed, in *Herbert v. Lando*, 441 U.S. 153 (1979), this Court assumed that a libel plaintiff is required to prove falsity:

> Although defamation litigation, including suits against the press, is an ancient phenomenon, it is true that our cases from *New York Times* to *Gertz* have considerably changed the profile of such cases. In years gone by, plaintiffs made out a prima facie case by proving the damaging publication. Truth and privilege were defenses . . . . The plaintiff's burden is now considerably expanded. In every or almost every case, *the plaintiff must* focus on the editorial process and *prove a false publication* attended by some degree of culpability on the part of the publisher.

441 U.S. at 175-176 (emphasis added).

Requiring the plaintiff to prove falsity in a libel action is consistent with this Court's refusal to sacrifice protected speech in order to regulate unprotected speech. In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983), this Court held that restrictions on purportedly commercial speech "must be examined carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." And in *Freedman v. Maryland*, 380 U.S. 51, 60 (1965), the Court invalidated a state law requiring licensing of films by a State Board because it "fail[ed] to provide adequate safeguards against undue inhibition of protected expression." This Court has recognized that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn . . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . ." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

To prevent the erroneous punishment of fully protected speech, this Court has held in a variety of contexts that all speech is presumptively protected. The burden of proving that speech is unprotected must lie with those who would impose sanctions. The Court has stated that "when the constitutional right to speak is sought to be deterred . . . due process demands that speech be unencumbered until the [party seeking to inhibit it] comes forward with sufficent proof to justify its

inhibition." *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958). The Court has found it impermissible to require that a party seeking a tax exemption prove that he had not engaged in criminal speech, *see Speiser v. Randall*, 357 U.S. 513 (1958), that a movie exhibitor prove that his film was worthy of a license, *see Freedman v. Maryland*, 380 U.S. 51 (1965), or that sellers of allegedly obscene magazines prove that their wares were not obscene, *see Blount v. Rizzi*, 400 U.S. 410 (1971).[2]

The Court has insisted on placing the burden of proving that speech is unprotected on those who would restrict or punish speech. That is the only way to assure that fully protected speech will not be impermissibly sanctioned. It is the plaintiff in a libel case, therefore, who must show that the challenged speech is not protected as truthful speech. When the evidence in a libel suit is in equipoise, and the fact finder cannot say whether a defamatory statement is more likely to be false than true, it is constitutionally impermissible to penalize presumptively truthful speech, which has not been proven to be false.

B. Imposing the Burden of Proving Truth on Defendants Unconstitutionally Deters Truthful Reporting.

This Court has recognized the impermissible deterrent effect that the imposition of the burden of proof can have on First Amendment freedoms. In *Speiser v. Randall*, 357 U.S. 513 (1958), the Court found unconstitutional a requirement that applicants for a tax exemption prove that they did not advocate the overthrow of the United States government by force or by violence:

> The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens . . . . [This procedural device] can only result in a deterrence of speech which the Constitution makes free.

Id. at 526.

2 The Pennsylvania scheme is particularly offensive because it not only shifts the burden of proof, but presumes that speech of a defamatory character is false rather than true. *See Hepps*, 485 A.2d at 378; *infra* at p.13. Presuming that speech is false allows such speech to be punished without any actual proof that the speech is in fact unprotected. The First Amendment does not tolerate such punishment. *See Speiser v. Randall*, 357 U.S. at 528.

Placing the burden of proving truth on defendants in a libel action will require defendants to consider not only whether what they published is true but whether they will be able to prove such truth in court. The press will often be unable to carry that burden because of the unique difficulties they face in attempting to prove truth. Witnesses may be unavailable or unwilling to testify to the truth of "vehement, caustic and sometimes unpleasantly sharp" defamatory statements. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). And when sources do choose to testify, they may have an incentive to lie. They may seek to disown what they had previously told reporters outside court, and they may want to avoid being sued themselves. *See* Franklin, *What Does "Negligence" Mean in Defamation Cases?*, 6 Comm/Ent L.J. 259, 279 (1984). There are many types of news about which the public should be informed but whose truth will be very difficult to prove in court. *Cf. Cervantes v. Time, Inc.*, 464 F.2d 986, 991 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (links between mayor and organized crime difficult to prove). Because proving the truth of a printed statement often depends on in-court corroboration from sources, and because issues of witness credibility will often be resolved against media defendants, *see* Franklin, *supra*, p. 15, at 279, it will often be difficult for the press to prove "truth" at trial. These difficulties are compounded by the fact that only the plaintiff in a libel action knows with *certainty* whether the defamatory statement is true—a reason commonly given for the placement of the burden of proof on a party. *See* E. Cleary, *McCormick on Evidence*, § 337, at 950 (1984).

The result of these difficulties of proof will be to deter truthful reporting:

> [t]he very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to "steer far wider of the unlawful zone" thereby keeping protected discussion from public cognizance.

Rosenbloom v. Metromedia, Inc. 403 U.S. 29, 52-53 (1971). The recent increases in the number of libel suits filed and the size of damage awards, *see* Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. Pa. L. Rev. 1, 1-2, 6-7 (1983) (typical damage award is in the millions of dollars; average punitive damage award is almost $8 million), already pose a threat of illegitimate suits:

> The prospect of such lucrative awards is likely to entice more potential defamation plaintiffs to bring suit, despite the fact that their claims do not meet the legal standards that appellate courts are struggling to impose.

Id. at 7.

The cost of defense and settlement will especially inhibit expression by small newspapers and other publications. They are more likely to be uninsured and less likely to be able to absorb the costs of a large lawsuit or damage award. *See* Curley, *How Libel Suit Sapped the Crusading Spirit of a Small Newspaper*, Wall St. J., Sept. 29, 1983, at 1, col. 1 (describing $9.2 million damage award against the *Alton Telegraph*); Franklin, *supra*, p.15, at 277-280; Smolla, *supra*, p. 12, at 12-13. In *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 53 U.S.L.W. 4866 (U.S. June 26, 1985), this Court made clear that the First Amendment protections against libel charges extend to defendants beyond large media defendants. Small, uninsured, or less established publications may find their very existence threatened by the need to prove in court that their investigative reporting is true.

Deterring the press from vigorous reporting infringes the First Amendment rights not only of the press but of the public

to receive information. This Court has long recognized that the public's interest in receiving news is of constitutional dimensions, *see Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), and that this interest strengthens the protection afforded willing speakers, *see Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976); *Procunier v. Martinez*, 416 U.S. 396 (1974); *Marsh v. Alabama*, 326 U.S. 501 (1946). The right of the public to receive truthful news—undampened and undistorted by the threat of adverse libel judgments—strengthens the media's already significant interest in procedural safeguards against libel judgments for truthful speech.

II. THE PENNSYLVANIA STATUTE VIOLATES DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT BY PRESUMING THE FALSITY OF A PUBLISHED STATEMENT SOLELY FROM THE STATEMENT'S DEFAMATORY CHARACTER.

Pennsylvania has imposed the burden of proving "the truth of the defamatory communication" on the defendant in a defamation case. 42 Pa. Cons. Stat. Ann. § 8343 (Purdon 1982). As the Pennsylvania Supreme Court explained, central to the Pennsylvania statutory scheme is the "presumption of falsity of the defamatory words." *Hepps v. Philadelphia Newspapers*, 485 A.2d 374, 378 (Pa. 1984). While falsity is an element of the tort of libel, falsity is presumed solely from the defamatory nature of the words. *Id.* at 378-79 and n.2. The burden is then on the defendant to establish the truth of what was published.

Under the Pennsylvania allocation of proof, if the trier of fact cannot ascertain the truth or falsity of a defamatory statement, the statement must be presumed false. This statutory presumption violates due process guaranteed by the Fourteenth Amendment because the presumption of falsity bears no

rational connection to the proven fact that a statement is of a defamatory character.[3]

A legislative presumption of one fact from evidence of another violates due process if there is no "rational connection between the fact proved and the ultimate fact presumed . . . the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *Mobile J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910). This Court has therefore invalidated statutory civil presumptions when there was no "rational connection" between the fact proven and the fact statutorily presumed. *Western & Atlantic Railroad v. Henderson*, 279 U.S. 639 (1929). An irrational presumption cannot provide an element of a tort action. *Henderson*, 279 U.S. at 642. A state cannot define a tort, such as libel, to include an element, such as falsity, and then allow that element to be defined away by an irrational presumption.

In *Henderson*, this Court held that a Georgia statutory presumption violated due process by presuming, solely from the existence of a railroad grade crossing collision, that the railway company involved was negligent and that its negligence was the proximate cause of all damages resulting from the collision.

> The mere fact of collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway or of both or without fault of anyone. Reasoning does not lead from the occurrence back to its cause.

Henderson, 279 U.S. at 642-643.

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3 The standards for assessing the constitutionality of the Pennsylvania burden of proof are identical to standards relevant to reviewing statutory presumptions because the effect of the burden placement is equivalent to a presumption of falsity. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 27 (1976). "There are outer limits on shifting the burden of production to a defendant, limits articulated in a long line of cases in this Court passing on the validity of presumptions." *Patterson v. New York*, 432 U.S. 197, 230 n. 16 (1977) (Powell, J., dissenting).

Rationality is required so that the legislature cannot arbitrarily deprive a disfavored person, profession, or industry of a fair chance in court. Irrational presumptions are inherently suspect because they can severely tilt the balance of a trial against a party for no apparent reason. They are especially dangerous in the First Amendment context because of their potential to punish or deter valuable truthful speech. Irrational presumptions often "have no foundation except the intent to destroy" and must be invalidated. *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 85-86 (1916). "Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property." *Henderson*, 279 U.S. at 642. A statute creating a presumption that is arbitrary or does not rest on any definite basis violates the due process clause of the Fourteenth Amendment. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976); *Manley v. Georgia*, 279 U.S. 1, 6 (1929); *Henderson*, 279 U.S. at 642; *McFarland*, 241 U.S. at 86; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 81-83 (1911); *see Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 18-19 (1931) ("There must be some rational connection between the fact proved and the ultimate fact presumed. The legislative presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense.").[4]

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4 Similarly, in the criminal context, a statutory presumption of one fact from the existence of another has been held unconstitutional when the two were not rationally related. *Tot v. United States*, 319 U.S. 463, 467-468 (1943). The *Tot* standard has been interpreted to require not only a "rational connection" but, in addition, a statutory presumption "must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is *more likely than not* to flow from the proved fact on which it is made to depend." *Leary v. United States*, 395 U.S. 6, 36 (1969) (emphasis added). *Accord, Ulster County Court v. Allen*, 442 U.S. 140 (1979); *Turner v. United States*, 396 U.S. 398 (1970). The "rational connection" test and "more-likely-than-not" standard are fundamentally equivalent. Any differences in the formulations are "traceable in large part to variations in language and focus rather than to differences in substance." *Barnes v. United States*, 412 U.S. 837, 843 (1973).

Presuming that a published statement is false solely from the fact that it has a defamatory character is utterly irrational and unconstitutional. Proof that a statement has the potential to injure reputation does not demonstrate that the statement is false.

Nothing in "common experience" suggests a connection between defamatory statements and falsity. *See Tot*, 319 U.S. at 467-468. Indeed it would be incredible to assume that even a substantial portion of defamatory statements published in books and newspapers is false. The press publishes information about events which sometimes harms the reputations of individuals. But the wrongdoing which forms the basis for news will, unfortunately, often be true. *See United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *United States v. Mandel*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *United States v. Halderman*, 559 F.2d 31 (D.C. Cir. 1976) (*en banc*) (*per curiam*), *cert. denied*, 431 U.S. 933 (1977). The vast number of criminal cases that have clogged the courts, including prosecutions of public officials, public figures, or businessmen, testify to the obvious fact that reporting about defamatory facts will often be all too true. "In libel and slander cases generally, there is no particular causal connection between the proved fact (the making of a derogatory statement) and the presumed fact (the falsity of the statement). There is no particular reason to presume falsity." *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 376 (6th Cir.), *cert. granted*, 454 U.S. 962, *cert. dismissed*, 454 U.S. 1130 (1981).

Pennsylvania's presumption that defamatory statements are false derives from the common law of libel. *Hepps*, 485 A.2d at 378. The common law assumed that the reputation of a defamed individual was "good." This primary assumption was based on the notion that "any man accused of wrongdoing is presumed innocent until proven guilty." *Id*. Since defamatory statements harm reputation, a necessary corollary to preserve the assumption of good reputation was the presumption of the falsity of defamatory statements, which suggested "bad" reputation. The presumption of falsity was, therefore, not based on

any facts, knowledge, or evidence of the falsity of the statement, but only on the primary assumption of "good" character. That roundabout rationale remains the basis for Pennsylvania's presumption. *Id*. at 378-380.[5]

Despite this Court's recent acknowledgement that "[t]he process of making the determination of rationality [of statutory presumptions], by its nature, is highly empirical," *Usery*, 428 U.S. at 28 (citing *United States v. Gainey*, 380 U.S. 63, 67 (1965)), the Pennsylvania presumption is based on no set of data suggesting that defamatory statements are more likely than not to be false, contrary to due process standards. The presumption lacks any rational empirical or factual basis.

The second purported rationale for the Pennsylvania presumption of falsity of defamatory words is that "the absence of such a presumption would force the plaintiff in the unenviable position of proving the negative."[6] *Hepps*, 485 A.2d at 378; *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 448-49, 273 A.2d 899, 907 (1971). Falsity is presumed based on the notion that it will be more convenient for the person who printed the statement to prove truth since he, "knows precisely what particular event he is referring to and the source of his information, whereas the plaintiff, not knowing these facts, would experience great difficulty in refuting these general charges by showing their falsity."[7] *Hepps*, 485 A.2d at 378

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5 If the goal of the Pennsylvania legislature is truly to serve the principle that "any man accused of wrongdoing is presumed innocent until proven guilty," *Hepps*, 385 A.2d at 378, media defendants should be presumed to publish true, as opposed to false, statements.

6 Libel plaintiffs will often not have to prove a negative. Whether the positive or negative must be proved depends only on what a defamatory statement says. For example, if a newspaper publishes the statement "Mr. X has never done a valuable service for this community," Mr. X must prove the positive to rebut the defamatory words.

7 In fact, it may be more convenient for a libel plaintiff to prove falsity since he has the most information about himself and his reputation. Only the plaintiff knows with certainty whether what is said about him is true.

(*citing Corabi*, 441 Pa. at 450-51). However, a presumption's evidentiary convenience or efficiency cannot establish its constitutionality. Due process demands that a presumption bear some rational connection to an established fact. *Usery*, 428 U.S. 1; *Bandini*, 284 U.S. 8; *Henderson*, 279 U.S. 639; *Turnipseed*, 219 U.S. 35; *see Turner*, 396 U.S. 398; *Leary*, 395 U.S. 6; *Tot*, 319 U.S. 463. "The argument from convenience is admissible only where the inference is a permissible one . . . ." *Tot*, 319 U.S. at 469, *Leary*, 395 U.S. at 34. Irrational presumptions with no basis in fact are never permissible. Since the presumption of falsity is not rationally connected to the fact that a statement is defamatory, the presumption's alleged convenience cannot save it from violating due process.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted,

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